IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 301 of 1998

For Approval and Signature:

HONOURABLE MR.JUSTICE R.P.DHOLAKIA

HONOURABLE MS.JUSTICE H.N.DEVANI

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	YES
2	To be referred to the Reporter or not ?	YES
3	Whether their Lordships wish to see the fair copy of the judgment ?	NO
4	Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?	NO
5	Whether it is to be circulated to the civil judge ?	NO

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ASHOKKUMAR MAGANBHAI VANKAR - Appellant(s)
Versus
STATE OF GUJARAT - Opponent(s)

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Appearance :

MR JV JAPEE for Appellant
MS. MANISHA L. SHAH, APP for Respondent

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CORAM : HONOURABLE MR.JUSTICE R.P.DHOLAKIA

and

HONOURABLE MS.JUSTICE H.N.DEVANI

Date : 24/08/2007

CAV JUDGMENT

(Per : HONOURABLE MS.JUSTICE H.N.DEVANI)

1. By this appeal the appellant challenges the judgement and order dated 11th December, 1997 passed by the learned Additional Sessions Judge, Sabarkantha at Himatnagar in Sessions Case No.32 of 1996, whereby the appellant has been convicted for the offence punishable under section 302 of the Indian Penal Code and sentenced to life imprisonment and fine of Rs.5000/- and in default to undergo simple imprisonment for a period of one year.

2. The case of the prosecution is that the complainant Vidyaben had lodged a complaint that she had acquired a plot at a small distance from the Harijan-vas about four years ago, wherein they had started construction since six months. As the construction was going on it was necessary to sprinkle water on the walls, hence, she and her husband had gone to the plot on 6.12.1995 at about 6:00 p.m. Her husband would fill water in a container from the Harijan-vas and the complainant would meet him half-way on the road and take the container and sprinkle the water on the walls and hand back the empty container to her husband. It was the say of the complainant that her husband had gone to fill an empty container and she had gone to sprinkle

water and after sprinkling the water when she returned with the empty container she heard some commotion at the end of the Harijan-vas hence, she went to the narrow lane at the end of the Harijan-vas and found her husband lying in the lane and blood was flowing from his head. At that time, the complainant had seen Ashok Maganbhai Vankar a resident of the Harijan-vas running towards his house with a wooden pestle. She has also seen Pravin Ratnabhai Vankar and others going towards their vas (colony). The complainant went near her husband and found that he was dead, because of which she was frightened and started screaming and went to her house to inform her relatives. After a short while her brothers-in-law, Lavjibhai and Manubhai, carried her husband’s dead body and brought it home. After fetching a rickshaw from the village, her husband was seated in the rickshaw in a horizontal position, and she, accompanied by the leader of the village, one Revabhai Shamalbhai and Manubhai Dhulabhai and Lakhabhai Paragbhai, took her husband to the Idar Civil Hospital for treatment, where the doctor declared him dead. Thereafter, in connection with the death of her husband, the complainant came to know that Pravinbhai Vankar had tried to start the lights from the electric pole at the end of the Vankar-Vas and that a quarrel ensued between him and Ashokbhai Vankar and his mother Dahiben due to which Ashokbhai got hold of a wooden pestle from his house and ran after Pravinbhai. At that time

there was a scuffle between the two and the complainant's husband who had gone to fill water in the container intervened and tried to separate them, whereupon, Ashokbhai gave him one blow on his head with the wooden pestle due to which he fell down and died. The incident occurred at about 7:00 p.m. and the F.I.R. was lodged at about 21:00 hours.

3. Shri Jashwantsinh Babbabhai Rana, Idar Police Station, recorded the complaint (Exh.8) and the same was registered as Idar Police Station I C.R. No.171/95 for the offences punishable under section 302 of the Indian Penal Code and section 135 of the Bombay Police Act. The complaint was recorded at serial No.29 in the Station Dairy (Exh.48). He then drew the Inquest Panchnama between 7:00 to 7:30 a.m. at Idar Civil Hospital in the presence of panchas. Thereafter he sent the dead body for post mortem examination along with the inquest panchnama, police yadi and Marnotar Form (Exh.37). He then proceeded to Nana Kotda village for further investigation, where he drew panchnama of scene of offence (Exh.17) in the presence of panchas and collected muddamal articles from the scene of offence and also recorded the statements of Valabhai Khemabhai Vankar and Lavjibhai Khemabhai Vankar. Upon the accused being found, panchnama of physical condition of the accused (Exh.29), as well as panchnama under section 27 of the Evidence Act, whereby the accused

voluntarily discovered the weapon namely wooden pestle (Exh.28) were drawn in the presence of panchas. The Investigating Officer thereafter sent the muddamal articles to the Forensic Science Laboratory along with yadi (Exh.49) On receiving the FSL Report (Exh.50), Serological Report (Exh.51), and the Post Mortem Report (Exh.94), the same were kept in the investigation file. Upon completion of investigation, charge sheet was submitted before the learned Judicial Magistrate First Class, Idar, in Criminal Case No.278 of 1996.

4. As the case was exclusively triable by the Court of Sessions, the learned Magistrate vide order dated 21st March, 1996 committed the matter to the Sessions Court, Sabarkantha where it was registered as Sessions Case No.32 of 1996 and was transferred to the Court of the learned Additional Sessions Judge, Sabarkantha, Himatnagar for disposing the same on merits.

5. The learned Judge framed Charge at Exhibit-4 against the accused for offences punishable under sections 302 of the Indian Penal Code and section 135(1) of the Bombay Police Act at Exhibit 3. The charge was read over and explained to the accused. The accused pleaded not guilty to the charge and prayed for trial.

6. In order to prove the charge against the accused, the prosecution examined the following

fifteen witnesses:

- P.W.1 - Vidyaben Maganbhai Khemabhai – complainant and wife of the deceased,
- P.W.2 - Jivabhai Kodarbhai – Panch, Inquest panchnama,
- P.W.3 – Revabhai Shankarbhai – Panch, Scene of Offence Panchnama,
- P.W.4 – Pravinbhai Ratnabhai, Eye witness,
- P.W.5 – Haribhai Roopsinh – Panch, clothes of the deceased panchnama.
- P.W.6 – Savnathsinh Devisinh, Panch, Discovery Panchnama and Physical Condition of accused panchnama.
- P.W.7 – Rajubhai Ambalal – Circle Inspector who prepared scene of offence panchnama.
- P.W.8 – Dr. Ganpatsinh Ambadanji – performed autopsy,
- P.W.9 – Galajibhai Paragbhai – Eye witness,
- P.W.10 – Muliben Devjibhai – Eye witness,
- P.W.11 – Ashaben Maganbhai – daughter of the deceased,
- P.W.12 – Vakhatsinh Gambhirsinh Rathod – Recorded NC complaint lodged by Dahiben, mother of the accused,
- P.W.13 – Vijaysinh Hamirsinh – P.S.O. Idar Police Station, drew panchnama of clothes of deceased (Exh.25),
- P.w.14 – Jashwantsinh Babbaji Rana, Investigating Officer.

7. The prosecution also produced and proved the following documentary evidence:

(1) F.I.R. (Exh.8)
(2) Inquest panchnama (Exh.10)
(3) Scene of offence panchnama (Exh.17)
(4) Discovery panchnama of weapon used in commission of the offence (Exh.28)
(5) Panchnama of physical condition of the accused (Exh.29)
(6) Map of scene of offence (Exh.34)
(7) Yadi issued to Medical Officer for performing postmortem (Exh. 36)
(8) Post Mortem Report (Exh.37)
(9) Death Certificate (Exh.39)
(10) N.C. Complaint No.97/95 (Exh.45)
(11) Station Diary (Exh.48)
(12) Muddamal Yadi issued to FSL (Exh.49)
(13) FSL Report with Forwarding letter (Exh.50)
(14) Serological Report (Exh.51)

8. On submission of closing purshis by the learned Additional Public Prosecutor, the learned Additional Sessions Judge recorded further statement of the accused under section 313 of the Code qua incriminating circumstances. The defence of the accused was in the nature of denial. The accused neither examined any witness nor stepped into the witness box.

9. The learned Additional Sessions Judge, at the

end of trial, after hearing the learned Advocates appearing on behalf of the respective parties and appreciating the evidence on record, was of the view that the prosecution had successfully established the charge levelled against the accused, hence by the impugned judgement and order dated 11th December, 1997 convicted the accused for the offences punishable under section 302 of the Indian Penal Code and sentenced them to suffer imprisonment for life with fine of Rs.5000/- and in default to undergo simple imprisonment for a period of one year.

10. We have heard Mr. J.V. Japee, learned Counsel appearing on behalf of the appellant and Ms. M.L. Shah, learned Additional Public Prosecutor for the respondent State of Gujarat and have perused the record of the case.

11. Mr. J.V. Japee, learned Counsel for the appellant submitted that the prosecution had failed to prove its case beyond reasonable doubt therefore; the accused was entitled to acquittal. It was submitted that there are vital contradictions in the evidence of the eyewitnesses, which go to the root of the case generating serious doubts about the veracity of the prosecution case.

11.2 Referring to the testimony of the complainant

Vidyaben, learned Counsel submitted that there were contradictions in the testimony of this witness, in that in her testimony she has come out with an entirely new case from that stated in her complaint, namely that she is a witness to the incident. It was submitted that the witness had made drastic improvements in her case, therefore, her testimony was not reliable and as such the entire testimony is required to be discarded and cannot not be relied upon.

11.3 The next submission advanced by the learned Counsel for the appellant was that the intention of the appellant/accused was not proved and that there was a total absence of motive. It was vehemently urged that witness Pravinbhai was inimical towards the appellant because his ex-wife Ramilaben was related to the appellant and there had been disputes between them on that account. It was submitted that in all probability, Pravinbhai had struck the deceased with the bamboo stick several times to cause his death and had falsely implicated the appellant.

11.4 Pointing out the relationship between PW 9 Galaji Paragji, PW 10 Muliben Devji with PW 4 Pravinbhai, learned Counsel contended that the prosecution had not examined any independent witness and that all the witnesses were close relatives of witness Pravinbhai, and as such they would be interested in protecting him.

11.5 Learned Counsel contended that in view of the discrepancies and improvement found in the prosecution case, it is not safe to rely upon the same to convict the appellant. For this purpose he pointed out that PW 4, PW 9 and PW 10 who are eyewitnesses have in their evidence stated that the appellant had dealt one blow on the head of the deceased, however, if we compare this evidence of the eyewitnesses with the Medical evidence, it is noticed that the injury sustained by the deceased could not have been caused by one single blow. Moreover, the Medical Officer had also opined that if the weapon in question is used for inflicting a blow whether forcefully or not, there is bound to be some external injury, whereas in the present case there is no external injury on the person of the deceased. Therefore, the prosecution has failed to explain the discrepancy between the ocular and Medical evidence. In such circumstances, he contended that it was not safe to rely upon the evidence of these witnesses.

11.6 Learned Counsel for the appellant has further submitted that even if the prosecution case is to be accepted, having regard to the fact that the appellant is alleged to have inflicted only a single blow which proved to be fatal, the offence committed would not be one amounting to culpable homicide. Learned Counsel submitted

the incident had occurred on the spur of the moment in the heat of passion and that admittedly there was complete absence of motive to commit the alleged offence and that the complainant had admitted that there was no enmity between the deceased and the appellant. Hence, there was no intention to commit the murder on the part of the appellant. Therefore, if at all the conviction is to be upheld the same should be converted to one under section 304 Part II of the Indian Penal Code. It was urged the when two views are emerging from the prosecution case, the view which favours the accused should be considered.

11.7 In support of his arguments, the learned Counsel has relied upon the following authorities:

For the proposition that when two views are emerging from the prosecution case, the view which favours the accused ought to be considered:

(i) ***State of Haryana v. Inder Singh and others, [***(2002) 9 SCC 537],
(ii) ***Shingara Singh v. State of Haryana and another,*** [AIR 2004 SC 124],
(iii) ***Raghunath v. State of Haryana,*** [AIR 2003 SC 165],
(iv) ***Dev Raj and another v. State of H.P.,*** [AIR 1994 SC 523]

For the proposition that the evidence of inimical witnesses is required to be considered with care and caution:

(i) ***State of Rajasthan v. Sheo Singh and others,*** [AIR 2003 SC 1783],
(ii) ***State of U.P. v. Moti Ram and another,*** [AIR 1990 SC 1709],
(iii) ***Nanhku Singh v. The State of Bihar,*** [AIR 1973 SC 491],
(iv) ***Mer Ranmal Arjan and another v. State of Gujarat,*** 1995 (1) GLR 275].

For the proposition that since the appellant had inflicted a single blow, the conviction ought to be altered to section 304 Part II of the Indian Penal Code:

(i) ***K.Ramakrishnan Unnithan v. State of Kerala,*** [1999 Cri.L.J. 2101],
(ii) ***Pularu v. State of Madhya Pradesh, [***1993 Cri.L.J. 1809],
(iii) ***Sarup Singh v. State of Haryana,*** [1995 Cri.L.J. 4168],
(iv) ***Ramesh Vithalrao Thakre and another v. State of Maharashtra,*** [1995 Cri.L.J. 2907],
(v) ***Rajendrasinh Bahadursinh Zala v. State of Gujarat,*** [2004(4) GLR 3084],
(vi) ***Patel Rasiklal Becharbhai and others v. State of Gujarat,*** [1992 Cri.L.J. 2334].

Decisions pertaining to examination of the accused under section 313 of the Criminal Procedure Code:

(i) ***State of Maharashtra v. Sukhdeo Singh,*** [AIR 1992 SC 2100],
(ii) ***Avtar Singh and others v. State of Punjab,*** [AIR 2002 SC 3343],
(iii) ***Rattan Singh v. State of H.P.,*** [AIR 1997 SC 768].

12. Ms. Manisha L. Shah learned Additional Public Prosecutor submitted that there was ample evidence on record to connect the accused with the crime in question. It was submitted that as many as three eye witnesses had been examined by the prosecution. That despite searching cross-examination, the defence had not been able to shake the evidence of the said witnesses. It was submitted that the testimony of the eyewitnesses, together with the testimony of the complainant who had seen the accused fleeing away from the scene of offence with a pestle in his hand, coupled with the Medicalevidence and the discovery panchnama whereby the wooden pestle had been recovered at the instance of the accused undoubtedly point towards the complicity of the accused in the crime in question. Countering the submission by the learned Advocate for the appellant that in any case this was a case where a single blow had been

delivered and there was no intention to kill the deceased as admittedly the accused did not bear any animus towards the deceased, the learned Additional Public Prosecutor submitted that the intention is evident from the nature of blow inflicted on the deceased and the part of the body on which the blow was dealt. It was submitted that the accused had chosen a vital part of the body, namely the head of the deceased and the intensity of the blow was such that it caused multiple fractures in the skull of the deceased. It was submitted that the nature of the injury was self-speaking and there was no need to prove any further intention. Attention was drawn to the N.C. Complaint, Exh.45 lodged by Dahiben, the mother of the accused, to point out that the presence of the accused and the eye witnesses as well as the occurrence of the earlier part of the incident was duly proved from the said complaint. It was accordingly submitted that the conviction is required to be confirmed by this Court.

13. We have considered the rival submissions advanced by the learned counsel appearing for the parties. We have carefully examined the record of the case and have perused the impugned judgement. We have also considered the authorities cited at the bar.

14. Insofar as the death of the deceased being a homicidal one, the same has not been disputed by

the learned Advocate for the appellant, hence, we need not discuss the same in detail. Suffice it to say that the prosecution has succeeded in establishing that the death of the deceased was a homicidal one through the evidence of PW 8 Dr. Ganpatsinh Ambadanji who has been examined at Exh.35 as well as the Post Mortem Note Exh.94 and the Inquest Panchnama Exh.45. This witness has opined that all the injuries were ante-mortem in nature and the cause of death was due to shock as a result of excessive bleeding caused by the serious injuries sustained on the head, which were sufficient to cause death in the ordinary cause of nature.

15. We may now examine the culpability of the appellant–accused in connection with the crime in question. We have noticed that in the instant case, the offence has been committed at about 19:00 hours on 6th December, 1995 and the complaint (Exh.40) had been lodged with promptitude at 21:00 hours, that is, within two hours of the occurrence of the incident. From the complaint, it is borne out that the complainant had emptied the container and had returned to the old Harijan-vas when she heard some commotion and found that her husband was lying in the narrow lane and his head was bleeding. At the same time she had also seen the accused, who was a resident of the Harijan-vas, running away towards his house with a pestle in his hand. She had also seen Pravinbhai (PW 4)

and others going towards their Vas and on going near her husband she found that he was dead. The First Information Report (Exh.40) has been duly proved through the testimony of PW 1, the widow of victim. This witness had no enmity with the accused and though there is a tendency to exaggerate, it cannot be gainsaid that the witness must have seen the accused running from the scene of offence with the pestle in his hand. Merely because of some embellishments in the testimony, the whole of her testimony cannot be discarded. Accordingly, through the evidence of this witness the prosecution has succeeded in establishing the time and place of the incident, as well as the presence of the accused (with a wooden pestle) and PW 4 and others at the scene of offence. As the accused as well as PW 4 and others were residents of the Harijan vas, the complainant knew them; hence, there is no question of any misidentification.

16. As regards the scene of offence, the prosecution case finds further corroboration in the deposition of the PW 3 (Exh.47) who is a panch-witness in connection with the scene of offence panchnama (Exh.53). This witness has duly proved the panchnama of the scene of offence, which was drawn by the Investigating Officer in the presence of the panchas. As per the said panchnama the scene of offence is a narrow lane in the Harijan-vas where dried bloodstains were found, from which about 100 grams of

bloodstained earth had been collected and sealed. Certain articles including a sandal belonging to the deceased were also collected from the scene of offence. The panchnama further shows that an electric pole is situated at a distance of about 31 feet from the scene of offence. The panchnama also records that the electric pole where PW 4 tried to shake the wires is situated at a distance of about 77 feet from the scene of offence. The prosecution case is further fortified by the FSL report, which shows that the blood stained earth collected from the scene of offence, bears the same blood group as that found from the clothes of the deceased. Therefore, the prosecution has been able to establish beyond reasonable doubt that the offence has been committed on the narrow lane of the Harijan-vas.

17. The evidence of PW 4, who was instrumental in giving rise to the incident, is also significant in that he is an eyewitness to the entire episode leading to the death of the deceased. His evidence therefore, requires to be considered in detail. This witness has deposed that he had returned home after grazing buffaloes at about 4 to 5 O’clock in the evening and between 6:30 to 7:00 p.m. he had gone to his aunt (kaki) Muliben’s (PW 10) house for reading the newspaper. The lights at PW 10’s house had gone off whereas they were on in rest of the neighbourhood. He, therefore, tried to start the

lights by shaking the wires with a bamboo stick at the electric pole outside the Harijan vas, which resulted in the lights at the house of accused, who is a neighbour of PW 10, going off. This enraged the accused and he came out of his house along with his mother Dahiben and told him that he was not an electrician and asked him what authority he had to come there. Both of them started abusing PW 4, due to which Ramilaben Galabhai, Galabhai Paragbhai (PW 9) and Dinesh Lalji who were residing in the vicinity came out and tried to pacify them. However, both the accused and his mother hurled even more abuses. Thereafter, the accused went inside the house and came out with a wooden pestle. On seeing the accused coming out with the pestle, PW 4 started running towards the narrow lane in the old Harijan-vas. The accused chased PW 4 and when he caught up with him, he raised the pestle to strike him, but PW 4 dodged it by sitting down and the pestle slipped from the accused’s hand and fell down on the ground. Thereafter, the accused and PW 4 grappled with each other. Upon hearing the noise ensuing there from, PW 10, PW 9 as well as Dineshbhai and Ramilaben came running there. Thereafter, Maganbhai Khemabhai (the deceased) who was going with a container to fill water came there and tried to separate the two. With a view to separate them, he pushed them both apart. As soon as they fell apart, the accused picked up the pestle that was lying on the ground and

dealt a blow on the deceased's head. The blow landed on the posterior side of the deceased's head with a loud noise like the bursting of fire-crackers and the deceased fell down, whereupon, the accused fled from the scene along with the pestle. PW 4 was also scared and ran away. This witness has been subjected to a searching cross-examination, wherein the defence has tried to make out a case that the said witness was inimical towards the accused because the accused was related to his ex-wife, Ramilaben. The defence has also tried to make out a case that this witness had tried to strike Dahiben with the bamboo stick, but the same struck the deceased causing his death. However, the defence has not succeeded in making even a dent in the credibility of this witness.

18. Since the genesis of the incident was the attempt by PW 4 to put on the lights at PW 10's house, which had the disastrous effect of resulting in putting off the lights at the house of the accused, he (PW 4) had witnessed the entire incident. His presence at the scene of offence, therefore, cannot be doubted. From the evidence of this witness the prosecution has been able to establish the genesis of the incident as well as the complicity of the accused in the crime, in that he had struck a blow on the head of the deceased with a wooden pestle. The presence of PW 9, PW 10, as well as Dineshbhai and Ramilaben at the scene of offence

is also established from the evidence of this witness.

19. The evidence of PW 4, finds corroboration in the evidence of two other eyewitnesses, namely, PW 9-Galjibhai Paragbhai and PW 10-Muliben Devjibhai, both of whom had witnessed the incident right from the time the accused started quarreling with PW 4 till he struck the fatal blow on the deceased. Both these witnesses have testified that upon the lights going off at his residence, the accused had come out along with his mother and had started hurling abuses at PW 4. That they had tried to pacify him but to no avail. Instead, the accused went inside his house and armed himself with the pestle and wielding the pestle chased an unarmed PW 4. That the accused caught up with PW 4 at a short distance and lifted the pestle to strike a blow, however, PW 4 dodged the same and the pestle fell down, after which the accused and PW 4 started to grapple with each other. That these witnesses tried to intervene. In the mean while the deceased came along with a container and tried to separate the two. As he pushed them apart, the accused picked up the pestle and struck the deceased on the posterior part of his head, on account of which the deceased fell down. There are slight discrepancies in the versions given by these witnesses; however, these are minor discrepancies, which do not in any manner corrode the credibility of the

prosecution case.

20. To establish the occurrence of the incident as well as the presence of the accused, his mother, PW4, PW10 and PW9 at the scene of offence, the prosecution has also placed reliance upon the NC Complaint No.57/95 (Exh-45) lodged by Dahiben Maganbhai Vankar, the mother of the accused with the Idar Police Station, wherein it has been alleged that on 6.12.1995 at 18.30 hours, PW4 had shut off the light from the electric pole outside their house, and upon questioning him as to why he had shut off the light, he had abused and assaulted her and because of the hubbub, her relatives PW10, PW9 and others residing nearby had come to her rescue. That, the incident had taken place on account of the lights going off. The said NC Complaint has been proved through the evidence of Vakhatsinh Gambhirsinh Rathod who was in charge of the Idar Police Station at the relevant time and has been examined at Exhibit-44.

21. The learned counsel for the appellant has sought to discredit the evidentiary value of the testimony of these witnesses on the ground that they are related to PW 4 and are therefore, interested witnesses. In this regard, it may be noticed that the very genesis of the incident has taken place on account of the lights having gone off at the house of PW 10, who incidentally was an aunt of PW 4. PW 4 had gone to her house

to read the newspaper and as the lights had gone off, he had tried to restore the electricity by shaking the wires at the electric pole. PW 10 was present through out the incident. Her presence at the scene of offence is natural. The presence of PW 9 who lives in the vicinity has also been established. Hence, merely because they are related to PW 4, would not reduce the evidentiary value of their testimony if it were otherwise found to be trustworthy and reliable. From the evidence of these eyewitnesses it becomes clear that it is the accused who is the author of the crime in question. The defence has not been able to discredit their testimonies. Merely because both the eyewitnesses are closely related to the PW 4, is no ground to discard their testimonies. These witnesses have neither been shown to be inimical to the accused nor do they have any close relation with the deceased. Hence, they have no cause or reason to give false evidence against the accused. The Apex Court in the case of State of ***A.P. v. S. Rayappa and others***, (2006) 2 Supreme Court Cases (Cri) 353, has held that the term interested postulates that the person concerned must have some direct interest in seeing the accused person being convicted somehow or the other either because of animosity or some other reasons. The defence has not succeeded in establishing that the said witnesses bore any animus towards the accused so as to falsely implicate him in the crime and the suggestion

that it was PW 4 who had dealt a blow with a bamboo stick on the head of the deceased is too far fetched in the face of the overwhelming evidence on record. Hence, there was neither any animus against the accused nor any other reason for the aforesaid witnesses to falsely implicate the accused in the crime. After carefully evaluating the evidence of the eyewitnesses, we are satisfied that the trial court has rightly placed reliance on their evidence, as their testimonies appear to be trustworthy and reliable and their presence at the scene of offence is natural. In the aforesaid premises the reliance placed by the learned Counsel for the appellant upon the decisions as regards evidence of inimical witnesses is misplaced and do not lend any support to the case of the appellant.

22. The evidence of the eyewitnesses finds further corroboration in the Discovery Panchnama under section 27 of the Evidence Act drawn by the Investigating Officer in the presence of panchas. PW 6, the pancha of the Discovery Panchnama Exh.28 has been examined at Exh.26 but he has not supported the panchnama, though he has admitted his signature on the panchnama and panch slips. However, the prosecution has been able to prove the panchnama through the testimony of PW.14, the Investigating Officer Shri Jashwantsinh Babbaji Rana who has been examined at Exh.47. Under the said panchnama

(Exh.28) a wooden pestle has been recovered at the instance of accused.

23. The prosecution case is further fortified by the testimony of PW 8, Dr. Ganpatsinh Ambadanji (Exh.35), who had performed autopsy of the dead body of the deceased and produced the Post-mortem Report at Exh.37. This witness has deposed that upon conducting post mortem examination of the deceased, the external injuries found were in the nature of big haematoma on the frontal as well as on the right and left parietal region. There was no incised or contused lacerated wound on the skull. However, there were multiple fractures of the skull bone, which was palpable on the frontal as well as right and left parietal region. Upon internal examination it was noticed that big haematoma was present on the frontal, right parietal and left parietal region; there were multiple fractures of frontal and right and left parietal bones as well as right and left temporal bones; the dura was ruptured on associated brain area, more on the frontal and right parietal region; there was contusion of frontal and parietal lobe; about one litre clotted blood was present in the cranial cavity and subdural and extradural haematoma was present on the frontal and right parietal region. He has deposed that the internal injuries were corresponding to the external injuries. He has further deposed that all the

aforesaid injuries were ante-mortem in nature and that the death of the deceased had been caused due to acute cardio-respiratory failure following severe haemorrhagic shock due to severe head injury. He has also deposed that the muddamal weapon, i.e., the wooden pestle, can cause the injury.

24. The prosecution case finds further support in the Inquest Panchnama Exh.10, which has been duly proved through the evidence of PW 2, in whose presence the Investigating Officer had drawn the panchnama. In the said panchnama it has been recorded that there is a depression on the top of the head of the deceased and the said part has become soft. It is also noted that it appears that there is fracture of the bones inside and that except for the said injury, there does not appear to be any injury on the head. It is also recorded that there was excessive flow of blood from the nose. No other notable injury is found on the body of the deceased. Thus, the external injuries as recorded in the inquest panchnama and the post-mortem report are in consonance with each other.

25. The learned Counsel for the appellant has raised a contention that the Medicalevidence is not in consonance with the ocular evidence, in that the Medical Officer has opined that an injury of this nature cannot be caused by a single blow and further that looking to the weapon in

question, namely the wooden pestle, if the same is used for inflicting a blow whether forcefully or not, there is bound to be some external injury, whereas in the present case there is no external injury on the person of the deceased. That the prosecution having failed to explain the discrepancy between the ocular and Medical evidence, it was not safe to rely upon the evidence of the so-called eyewitnesses. The legal position in this regard is well settled. The Apex Court in the case of State of ***U.P. v. Krishna Gopal*** (1988) 4 SCC 302 held thus:

> *"20. Coming to the plea that the Medical evidence is at variance with ocular evidence, it has to be noted that it would be erroneous to accord undue primacy to hypothetical answers of Medical witnesses to exclude the eyewitnesses' account which had to be tested independently and not treated as the "variable" keeping the Medical evidence as the "constant".*
>
> *21. It is trite that where the eyewitnesses' account is found credible and trustworthy, Medical opinion pointing to alternative possibilities is not accepted as conclusive. Witnesses, as Bentham said, are eyes and ears of justice. Hence, the importance and primacy of the quality of the trial process. Eyewitnesses' account would require a careful independent assessment and evaluation for its credibility which should not be adversely prejudged making any other evidence, including Medical evidence, as the sole touchstone for the test for such credibility. The evidence must be tested for its inherent consistency and inherent probability of*

> *the story; consistency with the account of other witnesses held to be creditworthy; consistency with the undisputed facts, the "credit" of the witnesses; their performance in the witness box; their power of observation etc. Then the probative value of such evidence becomes eligible to be put into the scales for a cumulative evaluation."*

These principles have again been reiterated by the Apex Court in the case of ***Krishnan v. State***, (2003) 7 SCC 56.

Viewed in the light of the aforesaid principles laid down by the Apex Court, on an independent assessment and evaluation of the ocular evidence, we find the same to be cogent, credible and trustworthy. The aforesaid contention therefore does not merit consideration.

26. It has been contended by the learned counsel for the appellant that it cannot be said that the appellant inflicted the blow on the deceased with the intention of causing murder of the deceased so as to be convicted under section 302 of the Indian Penal Code. In support of his contention the learned Advocate has placed reliance upon the decision of the Apex Court in the case of ***K. Ramakrishnan Unnithan v. State of Kerala*** (1999 CRI.L.J. 2101) wherein on the facts of the said case, the Court had set aside the conviction of the appellant therein under section 302, IPC and instead, convicted him

under section 304, Part II.

27. It had been argued that since the appellant had dealt only a single blow, the offence if at all, cannot be one falling under Section 302 IPC or at the most, it would come under Section 304 Part II IPC since there is absolutely no material to show that the appellant had knowledge that he would be causing imminent death of the deceased. In this regard we have examined the Medical evidence and the manner in which the assault in question has taken place. The Medical Officer has opined that the injury was caused in such a manner as to cause the death of the deceased. On internal examination the Medical Officer had found there were multiple fractures of the frontal, right and left parietal and right and left temporal bones of the skull and rupture of the dura on associated areas causing subdural and extradural haematoma on the frontal as well as right and left parietal regions. The Medical Officer has opined that the death was due to acute cardio-respiratory failure following severe haemorrhagic shock as a result of the severe head injury, which was sufficient to cause death in the ordinary course of nature.

28. In the case of ***Jai Prakash v. State (Delhi Administration***) (1991) 2 SCC 32, a three judge bench of the Apex Court was of the view that the decision of the Apex Court in the case of ***Virsa***

Singh v. State of Punjab, AIR 1958 SC 465, is considered to be an authoritative pronouncement regarding the interpretation of Clause Thirdly of Section 300 IPC. It would be profitable to refer to the following passage from the ***Virsa Singh case***, which was referred to by the Court.

> *"To put it shortly, the prosecution must prove the following facts before it can bring a case under S. 300 "thirdly";*
>
> *First, it must establish, quite objectively, that a bodily injury is present;*
>
> *Secondly, the nature of the injury must be proved; These are purely objective investigations.*
>
> *Thirdly, it must be proved that there was an intention to inflict that particular bodily injury, that is to say, that it was not accidental or unintentional or that some other kind of injury was intended.*
>
> *Once these three elements are proved to be present, the enquiry proceeds further and,*
>
> *Fourthly, it must be proved that the injury of the type just described made up of the three elements set out above is sufficient to cause death in the ordinary course of nature. This part of the enquiry is purely objective and inferential and has nothing to do with the intention of the offender.*
>
> *13. Once these four elements are established by the prosecution (and, of course, the burden is on the prosecution throughout) the offence is murder under S. 300 "thirdly". It does not matter that there was no intention to cause*

death. It does not matter that there was no intention even to cause an injury of a kind that is sufficient to cause death in the ordinary course of nature (not that there is any real distinction between the two). It does not even matter that there is no knowledge that an act of that kind will be likely to cause death. Once the intention to cause the bodily injury actually found to be present is proved, the rest of the enquiry is purely objective and the only question is whether, as a matter of purely objective inference, the injury is sufficient in the ordinary course of nature to cause death. No one has a licence to run around inflicting injuries that are sufficient to cause death in the ordinary course of nature and claim that they are not guilty of murder. If they inflict injuries of that kind, they must face the consequences; and they can only escape if it can be shown, or reasonably deduced, that the injury was accidental or otherwise unintentional."

Bearing in mind the aforesaid principles, if we consider the evidence discussed above, it is apparent that on the facts of the present case, Clause 3rdly of Section 300 IPC is fully attracted as all the four elements necessary for bringing a case within the purview of the said clause, stand fully established.

29. As regards the contention that the blow had been inflicted on the spur of the moment, the same is not acceptable for the reason that the incident took place near the electric pole outside the Harijan-vas when there was an altercation on

account of the light at the house of the accused going off. But thereafter, the accused went inside his house, and armed himself with a wooden pestle. What followed is also significant, because, PW 4 on seeing the accused armed with a pestle, fled from the scene, but the accused chased him and when he caught up with him, raised the pestle to strike a blow. But PW 4 dodged the blow, resulting in the pestle slipping out from the hand of the accused. Thereafter, both the accused and PW 4 grappled with each other, and the deceased who chanced to come on the scene on his way while fetching water, with the best of intentions intervened and tried to separate them by pushing them apart, whereupon the accused picked up the pestle and aimed a blow on the head of the unfortunate deceased, with such intensity that there was a noise like the bursting of fire-crackers which ultimately resulted in causing multiple fractures on the head of the deceased resulting into almost instantaneous death. Considering the aforesaid sequence of events, no man of ordinary prudence would come to the conclusion that the blow was inflicted on the spur of the moment. No doubt the accused did not have any enmity with the deceased, but the choice of weapon and the part of the body chosen for inflicting the blow can lead to only one conclusion, that is, that there was intention to cause death. The accused must, therefore, be attributed with the knowledge that when he used

the pestle forcefully on the head of a person, he was likely to cause death of the said person.

30. In the case of State of ***Rajasthan v. Dhool Singh*** (2004) 12 SCC 546, wherein the High Court had found that the prosecution had not established that the respondent had acted with an intention of causing death of the deceased, the Apex Court noted that the same was based on the fact that the respondent had dealt a single blow which according to the High Court took the act of the respondent totally outside the scope of Exception I to S. 300, I.P.C. Disagreeing with the finding of the High Court, the Supreme Court held that the number of injuries is irrelevant. It is not always the determining factor in ascertaining the intention. It is the nature of injury, the part of body where it is caused, the weapon used in causing such injury which are the indicators of the fact whether the respondent caused the death of the deceased with an intention of causing death or not.

31. Viewed in the light of the aforesaid decision, in the instant case it is true that the respondent had dealt one single blow on the head of the deceased with a wooden pestle. The said wooden pestle was 39 ½ inches in length and was thick at the lower end and narrow at the upper end. The circumference of the upper end (handle) of the pestle was about 4 ½ inches. There was a

steel ring fitted on it at the lower end. The act of the respondent, though solitary in number had caused multiple fractures on the skull of the deceased leading to almost instantaneous death. Any reasonable person with any stretch of imagination can come to the conclusion that such injury on such a vital part of the body with such a weapon would cause death. The injury sustained by the deceased not only exhibits the intention of the accused in causing the death of the victim but also the knowledge of the accused as to the likely consequence of such attack which could be none other than causing the death of the victim. In the circumstances, the contention raised by the learned Advocate for the accused that this was a case of a solitary blow and therefore, intention to kill was not established so as to bring the accused within the scope of Exception to Section 300 IPC cannot be accepted. Accordingly, there being no question of taking any other view, the decisions relied upon by the learned Counsel for the appellant in support of the proposition that when two views are possible, the view that favours the accused ought to be considered do not render any assistance to the case of the appellant.

32. The learned Counsel for the appellant had also placed reliance upon decisions pertaining to examination of the accused under section 313 of the Code of Criminal Procedure; however, in

absence of any submissions having been made in connection with the examination of the accused under section 313 of the Code we fail to see how they are relevant to the facts of the present case.

33. The cumulative effect of the discussion we have made above is that the prosecution has by leading cogent and reliable evidence established its case against the appellant. We, therefore, agree with the findings and conclusions arrived at by the learned Additional Session Judge in holding the accused guilty and sentencing him as stated hereinabove.

34. For the above reasons we confirm the conviction of the appellant under section 302 of the Indian Penal Code and dismiss the appeal.

35. The appellant/accused – Ashokkumar Maganbhai Vankar of Criminal Appeal No.301 of 1998 is on bail and hence, his bail bond shall stand cancelled. He is directed to surrender before the jail authorities within two months.

[R.P.DHOLAKIA, J.]

[HARSHA DEVANI, J.]

parmar*